

1 The Honorable Barbara J. Rothstein  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 WSOU INVESTMENTS, LLC,

9 Plaintiff,

10 v.

11 F5 NETWORKS, INC.,

12 Defendant.

13 Civil Action Nos. 2:20-cv-01878-BJR  
14 No. 2:21-cv-00124-BJR  
15 No. 2:21-cv-00125-BJR  
16 No. 2:21-cv-00126-BJR

17 ORDER GRANTING IN PART AND  
18 DENYING IN PART PLAINTIFF'S  
19 MOTION TO AMEND ITS  
20 INFRINGEMENT CONTENTIONS;  
21 DENYING PLAINTIFF'S REQUEST TO  
22 COMPEL DISCOVERY; DENYING  
23 DEFENDANT'S MOTION TO AMEND ITS  
24 INVALIDITY CONTENTIONS

16 I. INTRODUCTION

17 Before the Court are four combined cases involving four separate but related patents. *See*  
18 Case No. 20-cv-1878 ("1878 Case"), Dkt. 143; Case No. 21-cv-124 ("124 Case"), Dkt. 93; Case  
19 No. 21-cv-125 ("125 Case"), Dkt. 94; Case No. 21-cv-126 ("126 Case"), Dkt. 94. At issue here  
20 are Plaintiff's three motions to amend its infringement contentions, Defendant's motion to amend  
21 its invalidity contentions, and a lingering discovery dispute. Having reviewed the motions, the  
22 oppositions thereto, the record of the case, and the relevant legal authorities, the Court will grant  
23 in part and deny in part Plaintiff's motions to amend its infringement contentions, deny  
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1 Defendant's motion to amend its invalidity contentions, and deny Plaintiff's remaining discovery  
 2 requests. The reasoning for the Court's decision follows.

3 **II. MOTIONS TO AMEND**

4 **A. Legal Standard**

5 To amend infringement or invalidity contentions, the moving party must obtain the Court's  
 6 leave and demonstrate good cause. LPR 124 (W.D. Wash.) Unlike the liberal policy for amending  
 7 pleadings, the policy underlying the amendment of infringement and invalidity contentions is  
 8 "decidedly conservative." *REC Software USA v. Bamboo Solutions Corp.*, No. C11-0554JLR,  
 9 2012 WL 3527891, at \*2 (W.D. Wash. Aug. 15, 2012) (citation omitted). The Local Patent Rules  
 10 are "designed to require parties to crystallize their theories of the case early in the litigation and to  
 11 adhere to those theories once they have been disclosed." *O2 Micro Int'l Ltd. v. Monolithic Power*  
 12 *Sys., Inc.*, 467 F.3d 1355, 1366 (9th Cir. 2006) (referring to identical Rules in Northern District of  
 13 California).

14 Local Patent Rule 124 sets forth a non-exhaustive list of circumstances that, "absent undue  
 15 prejudice to the non-moving party," may constitute good cause: "(a) a claim construction by the  
 16 Court different from that proposed by the party seeking amendment; (b) recent discovery of  
 17 material prior art despite earlier diligent search; and (c) recent discovery of nonpublic information  
 18 about the Accused Device which was not discovered, despite diligent efforts, before the service of  
 19 the Infringement Contentions." LPR 124. The party moving to amend bears the burden of  
 20 demonstrating diligence in drafting its original contentions with as much specificity as possible  
 21 based on the information available at the time. *REC Software*, 2012 WL 3527891 at \*2.

22 **B. Plaintiff's Motions to Amend Its Infringement Contentions**

23 Plaintiff served its preliminary infringement contentions on Defendant in April 2021. *See*

1878 Case, Dkt. 64; *id.*, Dkt. 160 at 2; *see also id.*, Dkts. 144-2, 144-3, 144-4, 144-5. Plaintiff first  
 1 moved to amend its infringement contentions on February 10, 2022. *Id.*, Dkt. 143. It has since  
 2 filed two motions to supplement these amendments with additional revisions. *Id.*, Dkt. 166 (March  
 3 7, 2022); 126 Case, Dkt. 142 (May 20, 2022). The parties in this case agree that adding an entirely  
 4 new “Accused Device”—even if recently discovered—would be inappropriate at this stage of the  
 5 case.

7 Plaintiff seeks to amend both the document disclosing its infringement contentions (which  
 8 Plaintiff calls a “cover page”)<sup>1</sup> and the more detailed claim charts that accompany it<sup>2</sup> in each of  
 9 the four cases. *See* 1878 Case, Dkt. 144, Exhs. 1-15; 126 Case, Dkt. 95, Exhs. 1-15. The proposed  
 10 amendments to the infringement contentions largely consist of adding the names of products or  
 11 instrumentalities that were not specifically identified as “Accused Products” or “Accused  
 12 Instrumentalities” in Plaintiff’s original infringement contentions. *E.g.*, 125 Case, Dkt. 96-6 at  
 13 PDF 1-7; 1878 Case, Dkt. 145-5 at PDF 1-8. For example, in the 1878 Case, Plaintiff originally  
 14 accused three products by name: “F5 Traffix Signaling Delivery Controllers, F5 VIPRION  
 15 Platform and products, and F5 BIG-IP iSeries Platform and products.” *See* 1878 Case, Dkt. 145-  
 16 5 at PDF 3. In its proposed amended contentions, Plaintiff seems to expand these products to  
 17 include “hardware (including cloud and virtual versions) and software products” and adds several  
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 22 <sup>1</sup> The Local Patent Rules do not refer to this document as a cover page, but they also do not clarify what it should be  
 23 called. For simplicity, when the Court refers to Plaintiff’s “infringement contentions,” it refers to this document  
 24 alone and not the claim charts attached to it.

25 <sup>2</sup> Local Patent Rule 120(c) requires “[a] chart identifying specifically where each element of each Asserted Claim is  
 26 found within each Accused Device, including for each claim element that such party contends is governed by 35  
 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Device that performs the  
 27 claimed function.”

1 other product names: “F5 Velos system . . . F5 LTM system . . . CMP platform and products . . .  
 2 vCMP platform and products . . . TMOS, Big-IQ, iRules.” *Id.* Plaintiff also seeks to add broad  
 3 categories of products without naming any specifically, including “[a]ll F5 products . . . that  
 4 connect to or are used in conjunction with or communicate with” any of the Accused Products. *Id.*  
 5 at PDF 3-4.

6 Defendant opposes most of Plaintiff’s proposed amendments but has identified some to  
 7 which it assents. *Id.*, Dkt. 160 at 5 (citing *id.*, Dkt. 145-22 (green highlighting indicating  
 8 agreement)). Defendant argues Plaintiff’s other amendments amount to adding “new accused  
 9 products” to the infringement contentions<sup>3</sup> and should not be permitted. *Id.* at 6-11. Plaintiff  
 10 effectively concedes that the addition of entirely new products would not be permissible but  
 11 counters that it is not adding new products but is merely adding “components” of, or details  
 12 concerning, the existing Accused Products. In support of this statement, Plaintiff claims that every  
 13 product it seeks to add to its infringement contentions was referenced in its original claim charts  
 14 and thus is not “new.”<sup>4</sup> *Id.*, Dkt. 143 at 7.

15 **1. Plaintiff’s Supplemental Motions to Amend Are Denied**

16 As an initial matter, the Court will not consider Plaintiff’s supplemental motions to amend  
 17 its infringement contentions. The purpose of the Local Patent Rules governing infringement  
 18 contentions is to “crystallize the[] theories of the case early in the litigation” to prevent constantly  
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 24 <sup>3</sup> According to Defendant, the addition of certain products also implicates new infringement theories. 1878 Case,  
 25 Dkt. 160 at 11-12.

<sup>4</sup> This disagreement over whether certain products are within the scope of the existing Accused Products is also the  
 fault line of the ongoing discovery dispute that the Court will address *infra*. See, e.g., 1878 Case, Dkt. 149 at 7.

“shifting sands.” *REC Software USA*, 2012 WL 3527891, at \*2 (citation omitted); *Kruse Tech. P’ship v. DMAX, Ltd.*, Case No. SACV 09–00458–JVS (RNBx), 2009 WL 10674462, at \*1 (C.D. Cal. Dec. 21, 2009) (citation omitted). Even if the Court were to find there is good cause for one set of amendments, Plaintiff’s practice of continually filing new additions every time it reviews another tranche of discovery is exactly what courts and the Rules mean by “shifting sands.” Plaintiff’s first motion to amend, alone, contains over 3,000 pages of charts, exhibits, and briefing. The sheer volume of these materials serves to obfuscate Plaintiff’s infringement contentions, rather than clarify them as the Local Rules intend. Filing multiple motions of this size and scope on a rolling basis would not be permissible under the liberal standard for amending pleadings, let alone the “decidedly conservative” one that governs amendments to infringement contentions. Plaintiff’s supplemental motions to amend are denied.

## **2. Plaintiff’s Motion Lacks the Requisite Specificity**

As to the remaining motion, Plaintiff claims there is good cause for its amendments based on 124(c), stating in its opening brief that it “only recently identified the substance of its proposed amendments through its diligent discovery efforts.” 1878 Case, Dkt. 143 at 6. Plaintiff then describes various ways in which it has been diligent “throughout this case.” *Id.* Conspicuously lacking in Plaintiff’s argument is exactly what it learned during discovery and why it could not have been discovered earlier. *Id.* Plaintiff’s claim that “[t]hrough its diligent analysis of [Defendant’s] confidential source code and other technical documents . . . [Plaintiff] has identified a wide variety of new information . . . including both previously unavailable nonpublic information and previously unidentified public materials the relevance of which [Plaintiff] ascertained only through . . . discovery” is more form than substance and mostly amounts to a restatement of the legal standard. *Id.* Similarly, Plaintiff’s reply makes conclusory statements that Plaintiff obtained

1 “additional details” or “further specificity” about how the patented technologies function “during  
2 discovery.” *Id.*, Dkt. 174 at 5-7. The Court recognizes that, in theory, Plaintiff could have  
3 discovered previously unavailable information about Defendant’s products during its analysis of  
4 something like source code. However, Plaintiff at no time describes with specificity *what* that  
5 information is and why it was previously unavailable.

6 **3. Plaintiff’s Motion Goes Beyond the Accused Products**

7 The Court is not convinced that all of the products Plaintiff seeks to add to its infringement  
8 contentions are components of the Accused Products and/or were specified in the original claim  
9 charts. Plaintiff’s proposed amendments include a substantial number of product names, each of  
10 which was mentioned in a different context and with varying frequency in the claim charts. It  
11 would be virtually impossible for the Court to trace each amendment back to the original claim  
12 charts—combing through thousands of pages of technical specifications—to determine the extent  
13 to which it is related to an Accused Product. It is Plaintiff’s burden to provide the Court with the  
14 information necessary to establish that the proposed amendments are truly components of the  
15 Accused Products, and Plaintiff has not done so.

16 Furthermore, the Court is persuaded by Defendant’s explanation of three representative  
17 examples that at least some of the products Plaintiff names in its amended infringement  
18 contentions are not adequately grounded in the claim charts and are in reality new products. One  
19 of these example products is “LTM.” 1878 Case, Dkt. 160 at 8-9. In rebuttal, Plaintiff cites six  
20 instances in which LTM was mentioned in the claim charts. *Id.*, Dkt. 174 at 3 (citing *id.*, Dkt. 143  
21 at 8)). In several of these instances, LTM is not mentioned in a sentence but rather is buried in a  
22 long URL with many numbers, characters, and symbols (and no spaces), such that the letters “ltm”  
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1 could only be located by someone who already knows that they are there.<sup>5</sup> Where LTM is  
 2 mentioned in a sentence, it is not clear whether it is a component of an Accused Product or merely  
 3 cited as part of an example meant to illustrate how an Accused Product functions with other (non-  
 4 accused) products. *See, e.g., id.*, Dkt. 144-5 at 18.

5 At its core, Plaintiff's argument suffers from a fatal inconsistency. Plaintiff essentially  
 6 takes the position that it had enough information about these products to include them in its claim  
 7 charts. At the same time, Plaintiff argues the information was only recently discovered. To  
 8 remedy this apparent contradiction, Plaintiff qualifies that it knew of the products but not some of  
 9 their more "detailed features." *Id.*, Dkt. 174 at 3.

11 In the final analysis, it is apparent that Plaintiff's proposed amended infringement  
 12 contentions are not limited to describing the features of existing Accused Products. The  
 13 amendments plainly seek to accuse many more products of infringing Plaintiff's patents. *See, e.g.,*  
 14 *id.*, Dkt. 144-5 at 3. Whether or not these products were cited in the claim charts as components  
 15 or related products, they were not previously described as Accused Products. *Id.* Now, Plaintiff  
 16 labels them as such. *Id.* Plaintiff has the burden of explaining how the "detailed features" it  
 17 learned of during discovery transformed related products into infringing products, and Plaintiff  
 18 has failed to carry that burden.

20 **4. Defendant Would Be Unduly Prejudiced If Plaintiff Were Permitted to Amend**

21 Plaintiff claims that its proposed amendments would not prejudice Defendant because its

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 25 <sup>5</sup> For example, one of Plaintiff's citations is to the following URL: [https://techdocs.f5.com/content/kb/en-us/products/big-ip\\_ltm/manuals/product/vcmp-administration-viprion-13-1\\_0/\\_jcr\\_content/pdfAttach/download/file.res/vCMP\\_for\\_VIPRION\\_Systems\\_Administration.pdf](https://techdocs.f5.com/content/kb/en-us/products/big-ip_ltm/manuals/product/vcmp-administration-viprion-13-1_0/_jcr_content/pdfAttach/download/file.res/vCMP_for_VIPRION_Systems_Administration.pdf). 1878 Case, Dkt. 144-5 at 9.

1 original infringement contentions put Defendant on notice of the Accused Products, and that the  
2 amendments—merely representing components or additional detail—would not “expand the  
3 case.” 1878 Case, Dkt. 174 at 7. However, Plaintiff notes multiple times that its amendments are  
4 derived from “ongoing” discovery, and Plaintiff has already sought to supplement its amendments  
5 twice. *See, id.*, Dkt. 143 at 6; *id.*, Dkt. 166; 126 Case, Dkt. 142.

6 The Court cannot allow Plaintiff to continually expand or delay this case without a  
7 compelling justification. As noted above, the instant motion to amend contains over 3,000 pages  
8 of charts and other exhibits that require a considerable amount of time to review and respond to,  
9 delaying the case in the meantime. Additionally, there is significant overlap between the parties’  
10 discovery disputes and Plaintiff’s motion to amend, such that Defendant has been required to  
11 engage in several rounds of motion practice over repetitive disagreements. Permitting Plaintiff to  
12 amend its infringement contentions would only invite more squabbling and greater delay.

14 Accordingly, Plaintiff’s motion is denied as to all of the amendments Defendant opposes,  
15 both because it is not supported by good cause and because it would be prejudicial. *See id.*, Dkt.  
16 145-22. Plaintiff’s motion is granted as to the amendments to which Defendant has expressly  
17 consented. *Id.* To the extent not covered by the previous sentence, Plaintiff’s motion is also  
18 granted as to amendments that add source code as citations supporting existing contentions. Courts  
20 in this District have required that a plaintiff’s infringement contentions include “pinpoint citations  
21 to source code once the code has been provided to the plaintiff.” *E.g., REC Software USA*, 2012  
22 WL 3545056, at \*3 (citing *Vasudevan Software, Inc. v. Int’l. Bus. Machs. Corp.*, No. C09-05897  
23 RS (HRL), 2011 WL 940263, at \*7 (N.D. Cal. Feb. 18, 2011)). Defendant does not claim that  
24 Plaintiff could have accessed Defendant’s source code prior to discovery.

### **C. The Parties' Outstanding Discovery Disputes**

The Court noted in its June 27, 2022 order that one of the parties' discovery disputes is closely intertwined with Plaintiff's motion to amend its infringement contentions. 1878 Case, Dkt. 224 at 4. The products and topics on which Plaintiff seeks discovery are essentially the same as those Plaintiff sought to add to its infringement contentions.<sup>6</sup> *Id.* The Court has denied Plaintiff's motion to amend and determined that the products in question are not Accused Products—they are more akin to Related Products. During its September 30, 2021 teleconference, the Court ruled that Plaintiff was not entitled to discovery on Related Products. *Id.* at 1-2. Accordingly, the Court denies Plaintiff's outstanding discovery request described in the June 27 discovery order. *Id.* at 4; *see also supra* note 6.

#### **D. Defendant's Motion to Amend Its Invalidity Contentions**

Defendant has moved to amend its invalidity contentions to add a product called the “Link Controller” as prior art to one of Plaintiff’s patents. 126 Case, Dkt. 80. Like a motion to amend infringement contentions, a motion to amend invalidity contentions requires a showing of good cause. LPR 124. Local Patent Rule 124(b) states that the “recent discovery of material prior art despite earlier diligent search” may constitute good cause.

The Link Controller is one of Defendant's product, and Defendant does not deny that information about the product was in its possession at the start of the case and could have been

<sup>6</sup> Specifically, Plaintiff requests that the Court compel discovery on “the full scope of accused products, including, but not limited to, producing source code and other responsive documents and information and designating 30(b)(6) witnesses to testify about (1) components that the accused products use to achieve their accused functionalities, including TMOS, iRules, Analytics, iApps, iControl, iCall, Container Connector, iQuery, Big-IP Monitors and MRF; and (2) virtual and cloud editions of F5’s BIG-IP and VIPRION platforms.” 1878 Case, Dkt. No. 149 at 7.

1 identified earlier. *See* 126 Case, Dkt. 88 at 4; *id.*, Dkt. 80 at 3. Defendant nevertheless argues that  
2 it conducted a diligent search and that its failure to discover the Link Controller earlier was due to  
3 the enormous amount of information it had to review to defend this action. *See id.*, Dkt. 80 at 3  
4 (“[Defendant’s] investigation . . . required an assessment of activities that occurred over fifteen  
5 years ago, which is tantamount to a lifetime in the electronics industry.”). Defendant claims it  
6 identified the Link Controller as relevant in September 2021 while conducting an internal review  
7 in response to one of Plaintiff’s interrogatories. *Id.* at 3-4.

8 Defendant has not demonstrated good cause to amend its invalidity contentions. This  
9 action commenced in January 2021. Although it is understandable that Defendant did not have  
10 information regarding the Link Controller at its fingertips at the start of the action, it had months  
11 to conduct a more diligent search. Furthermore, Defendant identified the Link Controller in  
12 September but did not move to amend until late December. Given the complexity of this case and  
13 the delays it has already sustained, allowing Defendant to amend its invalidity contentions would  
14 only open the door to additional discovery and impede the limited progress made toward a  
15 resolution. Therefore, Defendant’s motion is denied.

### 18 III. CONCLUSION

19 For the foregoing reasons, the Court rules as follows:

20 1) Plaintiff’s motion to amend its infringement contentions (1878 Case, Dkt. 143; 126  
21 Case, Dkt. 94; 125 Case, Dkt. 94; 124 Case, Dkt. 93) is granted in part and denied  
22 in part. Plaintiff may amend its infringement contentions and claim charts to add  
23 pinpoint citations to source code and make those changes to which Defendant has  
24 expressly consented. Plaintiff shall serve its amended infringement contentions on  
25 Defendant no later than July 11, 2022. Plaintiff’s motion is denied in all other  
respects.

2) Plaintiff’s motions to supplement its amended infringement contentions (1878  
Case, Dkt. 166; 126 Case, Dkts. 106, 142; 125 Case, Dkt. 106; 124 Case, Dkt. 105)  
are denied.

1 3) Plaintiff's request to compel discovery (1878 Case, Dkt. 148; 126 Case, Dkt. 99;  
2 125 Case, Dkt. 99; 124 Case, Dkt. 98) is denied.  
3 4) Defendant's motion to amend its invalidity contentions (126 Case, Dkt. 80) is  
4 denied.

5 DATED this 1st day of July, 2022.

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7 BARBARA J. ROTHSTEIN  
8 UNITED STATES DISTRICT JUDGE